

# THE INTERIM

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## LEGISLATOR E-MAIL ADDRESSES

Legislators, Please Let Us Know if You Change Your E-Mail Address...The Legislative Services Division maintains a list of legislator e-mail addresses on the Montana State Legislature's website for those legislators who have agreed to have their address posted. This list can be accessed from the Legislature's website at <http://www.leg.mt.gov> (At the top of the page, select "Senate" or "House" and then "Members".)

To keep this list current, we need to hear from legislators who change their e-mail address. If your address has changed or if you want your address to be posted on the Legislature's website, please send an e-mail message to Marsha Sager at [msager@mt.gov](mailto:msager@mt.gov). Thanks for your help.

## CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

"Legislative Roundup" to be Held in June...The Children, Families, Health, and Human Services Interim Committee will meet in Helena on June 29 and 30 in Room 152 of the Capitol. On June 29, the committee will hold a "Legislative Roundup." The Department of Public Health and Human Services will present its proposed legislative package for the 2005 session; the committee also invites other interested parties to present any health or human services legislative proposals at that time. Please contact Susan Fox if you are interested in presenting your proposals to the committee.

Committee to Work on Interim Studies...On June 30, the committee will work on finishing its interim studies. The committee has forwarded its recommendations on HJR 3 (indigent defense for parents in child abuse and neglect proceedings) to the Law and Justice Interim Committee for inclusion in the proposed statewide public defender system. The recommendations are available on the CFHHS website.

The SJR 11 study on substance abuse prevention, treatment, and justice will include a review of the results of the governor's Methamphetamine Summit. The committee will also consider two different proposals to create a chief prevention and treatment officer in either the Board of Crime Control or the Interagency Coordinating Council on Prevention (known as the ICC). The Committee's final meeting is scheduled for Aug. 27.

Information Available...Meeting materials will be available on the committee's website by mid-June. If you need more information or wish to be placed on the interested persons list, contact Susan Byorth Fox at (406) 444-3597 or [sfox@mt.gov](mailto:sfox@mt.gov).

## ECONOMIC AFFAIRS COMMITTEE

Weighing the Costs of Change...At its May 5 meeting, the Economic Affairs Interim Committee steered away from proposals that made no changes in workers' compensation laws and asked an ad hoc advisory group to develop legislative options that incorporate Supreme Court decisions on occupational disease laws. The committee also asked for draft legislation that would consolidate exclusions and exemptions in an attempt to simplify workers' compensation laws. All versions of the workers' compensation law revisions will be reviewed at the Committee's June 30 and July 1 meetings. Several members wanted to see legislation before deciding whether doing "something" is preferable to doing "nothing." To see options selected for further review, go to the committee website under May 5 meeting materials: [http://leg.mt.gov/css/committees/interim/2003\\_2004/econ\\_affairs/meeting\\_materials/5\\_5.asp](http://leg.mt.gov/css/committees/interim/2003_2004/econ_affairs/meeting_materials/5_5.asp) and click on "Exemption Worksheet" (options 4 and 5 chosen for proposed legislation) and on "Occupational Disease Options Worksheet" (options 1 and 2 chosen for proposed legislation).

One from Column A, One from Column B...After hearing presentations on various costs and benefits of state involvement in providing venture capital, the committee asked for draft legislation to implement a "Fund of Funds" concept, which would use some form of state incentives to encourage professionally managed venture capitalists to locate in the state. The committee also recommended further development of proposals related to networking of investors willing and able to invest in Montana ventures.

Two-day Meeting to Review of Legislative Proposals ...The committee plans to review proposed legislation from the agencies for which it has monitoring duties and from Montana State Fund at its June 30 and July 1 meetings in Room 137 of the state Capitol. On June 30, the Department of Agriculture, the Department of Commerce, and the State Auditor's Office will present their legislative proposals. The Department of Livestock has no legislative proposals. The committee will also review drafts of

economic development legislation related to the Fund of Funds concept and investor incentives or networking. The Montana Economic Developers Association and other interested parties will present economic development proposals for the committee's consideration. The committee will consider a proposal to deal with a Montana Supreme Court decision regarding insurance stacking.

On July 1, State Fund and the Department of Labor and Industry will present their legislative proposals. Legislative drafts on occupational disease laws and ways to simplify workers compensation statutes as they relate to exemptions and exclusions will also be up for review. For more information about the meetings, including start times, please visit: [http://leg.mt.gov/css/committees/interim/2003\\_2004/econ\\_affairs/default.asp](http://leg.mt.gov/css/committees/interim/2003_2004/econ_affairs/default.asp) or call committee staff--Pat Murdo, Eddy McClure, or Bart Campbell--at (406) 444-3064.

## ENERGY AND TELECOMMUNICATIONS COMMITTEE

Committee Still on the Road to Colstrip for June Meeting...The Energy and Telecommunications Interim Committee will meet in Colstrip on June 9 and 10. Colstrip is home to Montana's highest producing coal mine and four power plants. More electricity is generated at Colstrip than at any other site in Montana. Major topics on the agenda include:

- proposed projects to use Montana's coal resources to produce electricity;
- coal bed natural gas;
- measures to insulate utilities from the impact of riskier activities undertaken by holding companies or nonregulated affiliates;
- changes in law that would be needed to clearly authorize the default supplier of electricity to include generation facilities owned by the default supplier in the rate base and to earn a rate of return on the default supply of electricity;
- revision of the laws related to the Energy and Telecommunications Interim Committee and energy policy development;
- legislation proposed or under consideration by the Public Service Commission; and
- a draft bill to revise the laws governing universal system benefits funds collected from electricity customers.

Want to Know More?...More details about the June meeting and millions of bytes of valuable information may be viewed on the committee's website. To get to the

website, type "<http://leg.mt.gov>," click on "Committees," then click on "Interim." Scroll down to view the June meeting materials. Contact Mary Vandembosch at (406) 444-5367 or [mvandembosch@mt.gov](mailto:mvandembosch@mt.gov) for more information or to be added to a mailing list.

## REVENUE AND TRANSPORTATION COMMITTEE

Committee Gets an Earful on (Mostly Business Equipment) Property Taxes...Beginning with the June 1989 Special Session, the Montana Legislature has made significant changes to the taxation of personal property. House Bill No. 20 (Ch. 10, Sp. L. June 1989) combined several classes of personal property into property class eight and reduced the tax rate to 9% (personal property had been previously taxed at 11% to 16%). Senate Bill No. 417 (Ch. 570, L. 1995) provided a 3-year, phased-in reduction of class eight property from 9% to 6%. Senate Bill No. 200 (Ch. 285, L. 1999) reduced the tax rate on class eight property from 6% to 3%; provided a phased-in rate reduction and exemption of class eight property if a "trigger" related to the growth in real wages and salaries was met; exempted an aggregate of \$5,000 or less of class eight property (beginning in tax year 2000); incrementally reduced the tax rate on class six property from 4% to 1%; exempted class six property (livestock, canola seed oil processing facilities, malting barley facilities, and certain equipment intended for rent or lease) from taxation beginning in tax year 2003. Senate Bill No. 155 (Ch. 505, L. 2003) revised the calculation of the "trigger".

At the April 30 meeting of the Revenue and Transportation Committee, legislative staff presented several reports related to the taxation of business equipment. Jim Standaert, Legislative Fiscal Division, discussed trends in the market and taxable value of class eight business equipment, taxes levied, and effective tax rates (taxes paid on the property divided by the market or assessed value of the property). Since 1989, the market value of business equipment has grown by an average annual rate of 4.3% a year, ranging from a high of 10.7% in 1990 when business equipment was combined into one class to a decline of -0.3% in 2003. Because of the tax rate reductions, the taxable value of business equipment fell from \$258 million in 1989 to \$118 million in 2003. The effective tax rate on business equipment has declined from 3.2% in 1989 to 1.5% in 2003.

Standaert also presented information on the effective tax rates for all classes of property for the period 1999 through 2003. Effective tax rates for several classes of property range from 1.5% for business equipment to 1.1% for residential and commercial property. Class nine centrally assessed property (5.8%), class twelve railroad and airline property (1.9%), and class thirteen generation and telecommunication property (2.3%) have higher effective tax rates. Effective tax rates on most classes of property have increased since 2001 because of higher mill levies. Standaert also presented information on the relative proportions of "true" market value, taxable value, and taxes levied for each class of property.

Terry Johnson, Legislative Fiscal Division, presented information on the trends in wages and salaries related to the calculation of the class eight property tax trigger. The committee had earlier requested that Johnson determine separately the growth rates for private wages. Johnson calculated the real growth in total wages and salaries, private wages and salaries, and public wages and salaries since 1969. During that period, the trigger would have been met 9 times using total wages and salaries and 11 times using private wages and salaries. The last time the trigger would have been met (using either total wages and salaries or private wages and salaries) was 1998. However, in that year, a significant portion of the increase was attributable to a settlement payment made to workers at the Columbia Falls aluminum plant. The biggest gap in the trigger being met occurred between 1978 and 1992.

Rep. Joe Balyeat asked whether it is less likely that the trigger will be met now than in the 1970s. Johnson said that there are a couple of factors that make that true. First, transfer payments are a larger component of personal income and, second, Montana is a service-based economy. Both of these factors contribute to a fairly stable economy. Johnson said that wages and salaries could be affected by the increased activity in oil and gas development.

Lee Heiman, committee staff attorney, discussed the implications on the taxation of other property, particularly class twelve railroad and airline property, if the trigger is met and class eight business equipment becomes exempt. Federal law (the Railroad Revitalization and Regulatory Reform Act of 1976 and the Tax Equity and Fiscal Reform Act of 1982) prohibits imposing discriminatory taxes on railroad and airline property. According to Heiman, the equal protection clause of the U.S. Constitution and the Montana Constitution give the state a great deal of latitude in the classification of property and the state "need only have a rational basis for the classification." He pointed out that some states, such as North Dakota and South Dakota, do not tax personal property except utility personal property plus, in South Dakota, railroad and airline personal property. He said that the U.S. Supreme Court held in Oregon Dept. of Revenue v. ACF Indus. that the 4-R Act is not violated by exempting other types of personal property but taxing railroad personal property. Stan Kaleczyc, representing Burlington Northern Santa Fe Railway, said the ACF case may not apply to the broad personal property tax exemption if class eight property becomes exempt. He said that railroad personal property would also have to be exempt in order to comply with federal law.

Jeff Martin, committee staff, discussed a report that compared the relative tax burden of commercial and industrial real and personal property in Montana with 12 other states (based on a series of studies sponsored by the Minnesota Taxpayers Association); reviewed the relative importance of class eight property by county; provided an example of the revenue impact of "pulling" the class eight exemption trigger on class twelve railroad and airline property; discussed the feasibility of combining class eight business equipment with class four land and improvements; and presented alternatives to the calculation of class eight trigger. The report is available on the committee's website under "Staff Reports".

SJR 29 Study of the Taxation of Electrical Generation Property...At the committee's Feb. 13 meeting, Sen. Ken Toole requested information on how profitable an electric utility or wholesale generator is depending on whether it sells into wholesale or retail markets.

Jeff Martin provided some financial and operating information on Avista Corp. (a regulated utility) and PPL Montana (an exempt wholesale generator). Avista's operating revenue and expenses increased significantly from 1998 to 2000 and then began to decline. After-tax net income increased from \$87.7 million in 1998 to \$107.8 million in 2002. From 1998 to 2002, wholesale sales accounted for over 50% of operating revenue. In 2000, wholesale sales were \$864 million (67% of operating revenue), but, according to Avista figures, the utility paid over \$1 billion for purchased energy. In that year, Avista suffered a net operating loss of around \$4 million. Avista has reduced its activity in the wholesale markets since then (e.g., expiration of wholesale sales contracts). That reduction and the availability of hydroelectric power also reduced the amount of power purchased by Avista in 2002 and 2003.

Avista's revenue per megawatt hour for residential and commercial customers was relatively constant from 1998 to 2001. In 2002, electric energy surcharges and an increase in electricity rates in Washington led to an increase in revenue per megawatt hour for both residential and commercial customers.

PPL Montana has been operating in Montana since Dec. 17, 1999. Under the conditions of the rate moratorium of Senate Bill No 390 (Ch. 505, L. 1997) and a transition agreement, PPL Montana supplied the former Montana Power Company's native load through June 2002. That obligation may have affected PPL Montana's revenue per megawatt hour during the energy price spikes of 2000 and 2001. PPL Montana is now under contract with NorthWestern Energy to supply 300 megawatts of baseload electricity and 150 megawatts of unit-contingent on-peak electricity for 5 years. PPL Montana also makes short-term sales to NorthWestern. The energy supply contracts with NorthWestern Energy, PPL Montana's largest customer, accounted for 33% of PPL Montana's operating revenue in 2003. Operating income in 2002 and 2003 was below the amounts recorded in 2000 and 2001. Except for energy purchases and transmission charges, operating costs have been fairly stable since 2000.

Neil Colwell, State Government Relations, Avista Corp., talked about the differences between Avista and PPL Montana related to sales in the wholesale market. Colwell said that Avista's generation capacity is insufficient to meet the needs of its utility customers year round. Although Avista had sold large amounts of wholesale energy in the past, it typically purchased more energy than it sold. He said that all of Avista's generation capacity is included in the regulated rate base and that all of PPL Montana's generation capacity is dedicated to wholesale markets. Wholesale sales by Avista came from energy purchases or excess capacity. He told the committee that if total earnings exceed Avista's allowed rate of return, public utility commissions can order a rate reduction for customers. Conversely, PPL Montana is not subject to rate caps and earnings may flow to shareholders. He said that Avista's property valuations are based on limited earning potential and on historical depreciated costs of assets while PPL Montana's valuation is based in part on earnings and on the purchase price of generation facilities from Montana Power.

Other Reports... Department representatives and committee staff presented the following:

- Don Hoffman, director, Department of Revenue, reported that the lodging facility use tax and the cigarette tax are on the GenTax system and that withholding taxes will be on the system by early July.
- Russ Hyatt, Department of Revenue, compared the cost to the department and GC Services for collecting delinquent income taxes. Accounts with balances of less than \$200, out-of-state accounts, and accounts older than 3 years were given to GC Services for collection.
- Leanne Kurtz, committee staff, discussed the problem of a person who lives in Wyoming but works in Montana and who occasionally must drive a Wyoming-registered vehicle into the state. She said the Motor Vehicle Division is looking at eliminating the requirement to register out-of-state vehicles (61-3-701, MCA). Sen. Vicki Cocchiarella said that the low rate of compliance with 61-3-701, MCA, is an enforcement problem.
- Representatives from the Department of Transportation discussed federal highway reauthorization legislation, highway safety, a new transportation research project in Lewistown, federal and state laws on the enforcement of outdoor advertising, and, in response to a question from Sen. Jerry Black, the state's rail system.

Committee to Meet in July... The committee will meet in Helena on July 9 in Room 137 of the state Capitol. Although the agenda is still being developed, the Department of Revenue and the Department of Transportation will present their 2005 legislative proposals for committee review.

In the Loop... For more information about the committee, its work plan, or agendas, please visit the website (<http://www.leg.mt.gov> and follow the "Committees" links), or contact Jeff Martin at (406) 444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov) or Leanne Kurtz at (406) 444-3064 or [lekurtz@mt.gov](mailto:lekurtz@mt.gov).

## **SJR 32 SUBCOMMITTEE ON MEDICAL LIABILITY INSURANCE**

Subcommittee to Consider Draft Legislation in June... The SJR 32 Subcommittee, created by the Legislative Council and commissioned to study medical liability insurance, will meet on Thursday, June 24 in Room 317 of the Capitol. The principal agenda item for the June meeting will be further action on several draft bills,

which might include additional testimony, consideration of proposed amendments, or subcommittee action.

As a result of work done during the subcommittee's March work session, several options considered by the members are being prepared by staff into draft legislation. Included among the draft bills are:

- LC 5000: a Montana version of Wisconsin's *Health Care Liability and Injured Patients and Families Compensation Act*. This act, if adopted, would create an "excess liability insurance plan" in which medical providers and facilities would participate and through which all claims of medical negligence or malpractice would be processed. An overview of the Wisconsin act is on the subcommittee's website, under "Reports."
- LC5001: providing that for purposes of a medical malpractice claim, liability may not be imposed on a health care provider or health care facility for an act or omission by a person or entity claimed to have been an ostensible agent of the health care provider or health care facility at the time that the act or omission occurred.
- LC 5002: providing that an insurer against medical malpractice need not pay and may not be ordered by a court to pay any type of damages, including but not limited to medical expenses and lost wages, prior to a final settlement or a judgment when liability for the act or omission and liability for the damages are reasonably clear.
- LC 5003: providing that a third-party claimant may not bring an action for bad faith in connection with the handling of a medical malpractice insurance claim.
- LC 5004: providing that for purposes of a medical malpractice claim, a health care provider or health care facility is not liable for an act or omission by a person or entity that was not an employee or agent of or otherwise under the control of the health care provider or health care facility at the time that the act or omission occurred.
- LC 5005: regulating the amount of damages that may be granted for medical malpractice that reduces a patient's chance of recovery.
- LC 5006: revising the medical malpractice legal panel act by: requiring a claimant before the panel to pay half of the costs of the panel; increasing the maximum time in which a claim must be heard; requiring a legal record be made and kept of the panel hearing; and providing that the record, documentary evidence that is submitted, and panel decision are admissible in an action subsequently filed in a court.

- LC 5007: making expressions of sympathy or benevolence to an injured person or an injured person's family inadmissible as evidence of an admission of liability in a civil action.
- LC 5008: providing for qualifications for medical malpractice expert witnesses.
- LC 5009: providing for a joint underwriting association, consisting of all medical malpractice insurers operating in the state, that would provide medical malpractice insurance.

The "LC" numbers attached to the drafts are informal tracking numbers for reference only. None of the draft bills has been formally requested.

When any of the draft bills is in a sufficiently completed state of drafting, it will be distributed to subcommittee members and interested persons and will be posted to the subcommittee's website.

A summary of previous meetings is also available on the subcommittee's website, through the agendas and minutes of the meetings. Please check the website periodically for more details of the subcommittee's meetings, past and future. You may also contact the subcommittee's lead staff, Dave Bohyer, Legislative Services Division, at (406) 444-3064 or at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## STATE ADMINISTRATION AND VETERANS' AFFAIRS COMMITTEE

State Agency Legislative Proposals Scheduled for June Meeting...The State Administration and Veterans' Affairs Interim Committee will meet on Monday and Tuesday, June 14 and 15 in Room 137 of the state Capitol in Helena. (The June 14 and 15 dates are a change from the June dates that had been announced at the committee's previous meetings.)

The primary purpose of the meeting is to review state agency legislative proposals for the 2005 session. The committee is responsible for reviewing proposals from the Department of Administration, the Department of Military Affairs, and the Office of the Secretary of State, including any entities that are attached to any of the agencies (e.g., the Board of Veterans' Affairs or the Public Employees Retirement Board). Other legislation likely to be proposed--including legislation relevant to any of the public employee retirement systems, pay and benefit systems, public employee work rules, etc.--that is within the purview of the committee or the state agencies listed above may also be reviewed. Notice has been received that proposed legislation is also forthcoming from veterans (license plates) and from retired firefighters (benefit adjustments).

Subcommittee on Montana Highway Patrol Recruitment and Retention to Present Options...The subcommittee, including Rep. Stan Fisher, chair, Sen. Kelly Gebhardt, Rep. Larry Jent, and Rep. Ralph Lenhart, met on April 13. Col. Randy Yaeger and other staff of the Montana Department of Justice, of which MHP is a division, presented a detailed analysis of the problems and a detailed plan of action for consideration by the subcommittee. The plan of action included a recommendation to the Legislature to adequately fund in a predictable and sustainable manner the authorized level of MHP uniformed officers and to pay MHP uniformed officers on the basis of an index reflecting the pay levels of police officers and sheriff's officers in Montana's seven or eight most populous counties and the cities and towns within those counties.

Andrew Geiger, a performance auditor with the Legislative Audit Division, told the subcommittee that LAD is conducting a performance audit of the highway patrol. He discussed the preliminary findings and conclusions of the audit, most of which verified data and information provided by MHP. Geiger said that the final results of the performance audit will be presented to the Legislative Audit Committee in June. Additional information available in the final audit that is available by June 14 may be made available to the subcommittee at that time.

After discussing the causes and implications of the recruiting and retention challenges facing MHP, the subcommittee focused on potential solutions. The subcommittee decided that five options should be presented to the full committee at its June meeting. In order of priority, the options are:

- Appropriate approximately \$532,000 annually to MHP, funding that has been unavailable because of "vacancy savings" imposed on MHP. With this funding, MHP should be able to maintain its approved force of approximately 220 uniformed officers.
- Impose a \$5 annual fee on each automobile liability insurance policy sold in Montana. Revenue from the fee would be earmarked for MHP to mitigate problems of recruitment and retention of uniformed officers.
- As an alternative to a fee on each insurance policy, impose a \$5 annual fee on each vehicle registration or reregistration. Revenue from the fee would be earmarked for MHP to mitigate problems of recruitment and retention of uniformed officers.
- Increase the beer tax from \$4.30 a barrel (on production in excess of 20,000 barrels annually) to a level sufficient to fund the staffing and compensation recommendations, but not to exceed the current federal tax rate on beer.
- If none of the new sources of revenue is adopted, appropriate state general fund money for MHP to mitigate problems of recruitment and retention of uniformed officers.

For more information about the committee or the subcommittee, contact Dave Bohyer at (406) 444-3064 or at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## LEGISLATIVE FINANCE COMMITTEE

LFC Meeting Dates Changed...The Legislative Finance Committee will meet on June 17 at 1 p.m. and June 18 at 8 a.m. in Room 137 of the Capitol. The agenda tentatively includes the following items:

- 2005 biennium budget spending "pressure points";
- Developmental Disabilities Program: emerging issues;
- Update on Medicaid and Medicaid redesign;
- Update on state assumption of district courts;
- Report on governor's initiative to use Environmental Quality Protection funds;
- School funding decision: potential fiscal issues and impacts;
- Homeland Security; and
- State Fund: old fund balance.

The agenda and the reports for many of the agenda items will be available on the Legislative Fiscal Division website at <http://leg.mt.gov/css/fiscal/lfc.asp> in the days before the meeting and after. For more information about the meeting, please contact Clayton Schenck at [cschenck@mt.gov](mailto:cschenck@mt.gov) or by telephone at (406) 444-2986.

## JOINT SUBCOMMITTEE ON POSTSECONDARY EDUCATION POLICY AND BUDGET

Subcommittee Meets With Board of Regents...The Postsecondary Education Policy and Budget Subcommittee met in joint session with the Montana Board of Regents on May 19 in Great Falls. Economic development initiatives under consideration by the Shared Leadership group were presented to the joint committee for feedback and comment. The subcommittee and board tentatively approved the following initiatives:

- Two-year education;
- Distance learning;
- Montana university system - business partnerships;
- Montana university system and government collaboration;
- Promote and enhance access to postsecondary education; and
- Montana university system - Montana promotion partnerships.

The joint committee added a seventh initiative on workforce training to deal with immediate or urgent issues for workforce training and development needs of Montana.

The Shared Leadership group will continue to refine and develop the projects and will return to the Board of Regents and the Postsecondary Education Policy and Budget Subcommittee for final review and prioritization of the initiatives.

Next Meeting in July...The next meeting of the Postsecondary Education Policy and Budget Subcommittee will meet jointly with the Board of Regents on July 7 in Pablo, Montana. For more information about the meeting, please contact Pam Joehler at [pjoehler@mt.gov](mailto:pjoehler@mt.gov) or at (406) 444-5386. Meeting information is also posted on the subcommittee's website at <http://leg.mt.gov>. Just click on "Committees" and follow the links to the Education and Local Government Committee, Postsecondary Education Policy and Budget Subcommittee.

## ENVIRONMENTAL QUALITY COUNCIL

Cool, Clear Water...The Environmental Quality Council met on May 13 to consider water and water adjudication policy. The EQC discussed the need for the Water Court to establish rules to guide the use of its on-motion power. Chief Water Judge Bruce Loble committed to having rules submitted to the Montana Supreme Court for approval by Jan. 1, 2005.

Representatives from the Department of Natural Resources and Conservation and the State Library's Natural Resource Information System discussed the state water rights database and its capabilities. Although there are some problems with the database that need to be resolved, DNRC has committed to having the database fully functional by Jan. 1, 2005. The EQC has requested a third party review of the database to ensure that it can meet the needs of an accelerated pace for water adjudication.

The EQC reviewed comments that were received in response to some proposals on artificial water ponds. It established a working group consisting of Sen. Bob Story, chair, Sen. Dan McGee, Rep. Jim Peterson, and Rep. Paul Clark to develop ideas on permitting artificial ponds in Montana. The working group has not set a meeting date. It may make recommendations to the EQC in July.

The chief water judge is currently appointed by the chief justice of the Supreme Court. The EQC discussed whether this position should be elected and decided that a change is not necessary at this time.

Bud Clinch, director, DNRC, explained how the agency sets priorities for its programs through strategic planning once every 5 years. According to Clinch, the adjudication program is an important program within DNRC and a few open staff positions have been advertised for the water adjudication program and database development.

The EQC has often heard this interim that the water adjudication process is taking too long to complete. The process was begun in 1973, and it is estimated that at current funding and staffing it will take at least 40 more years to complete the first decree phase. In an effort to accelerate the process, the EQC is reviewing some funding alternatives for the program. Although funding is important to the state, it can be

politically charged and involve significant technical details. The EQC has established a working group to determine an appropriate funding mechanism or whether additional funding is necessary. The working group members are Sen. Mike Wheat, chair, Sen. Bob Story, Rep. Debby Barrett, Mr. Tom Ebzery. The working group will meet on June 7 at the Museum of the Rockies, Bozeman, at 9:30 a.m. The agenda for that meeting is available on the EQC website or you can contact Krista Evans, EQC staff, at (406) 444-1640 or kevans@mt.gov for additional information.

The EQC also reviewed a draft staff report on the current status of metal mine bonding in Montana. That report and other reports that have been prepared or are in draft form are available on the EQC website. The draft documents will be available for public comment from May 28 to June 30.

EQC Energy Policy Subcommittee...The subcommittee met on May 12 and heard a discussion on the potential impacts that international trade agreements have on state energy regulation. In addition, the state's bond counsel provided an overview of the mechanics of using bonds to fund state energy projects. The subcommittee approved its draft interim report, including draft recommendations and draft legislation, to be sent out for a 30 day public comment period in June. The next meeting of the subcommittee is scheduled for Monday, July 19.

EQC Agency Oversight Subcommittee...This subcommittee did not meet in May. The next meeting of the subcommittee is scheduled for Monday, July 19.

Environmental Quality Council to Meet in July...The EQC will meet in Helena on Monday and Tuesday, July 19 and 20. A portion of the first day will be set aside for meetings of the EQC Agency Oversight Subcommittee and the Energy Policy Subcommittee.

Minutes of past meetings, draft meeting agendas, and additional information about the Environmental Quality Council are available on the EQC website at [http://www.leg.mt.gov/css/lepo/2003\\_2004/default.asp](http://www.leg.mt.gov/css/lepo/2003_2004/default.asp), by calling (406) 444-3742, or by emailing eqc@mt.gov.

## LEGISLATIVE COUNCIL

Reports, Rules, and Money...At its March 26 meeting, the Legislative Council:

- received status reports on the Board of Regents' economic development initiative, state revenue collections and expenditures, SJR 32 Subcommittee on Medical Liability Insurance, and recent court challenges to state statutes;
- received a briefing on Television Montana activities and agreed to submit a letter of support as part of a federal grant application to permit statewide distribution of legislative programming;

- examined the current process used by interim committees to review proposed agency legislation and asked staff to develop a proposal for funding an additional day or days for review of agency legislation during the 2007 biennium;
- adopted proposed amendments to the Legislative Council Rules of Procedure on bill drafting;
- reviewed and revised proposed programs for a legislative rules workshop and new legislator orientation to be conducted in November 2004;
- agreed to pay up to \$350 in registration fees for each Pacific Northwest Economic Region delegate to attend the annual meeting this July; and
- began discussions on potential budget proposals for the 2007 biennium.

Computer System Plan on Agenda for Next Meeting...The council's next meeting is Friday, June 25 in Room 317 of the state Capitol. Members are scheduled to hear reports on several topics including the activities of the SJR 32 Subcommittee on Medical Liability Insurance and recent court challenges to state statutes. Staff will present the initial draft of the 2007 biennium legislative branch computer system plan. The council will discuss budget proposals for the 2007 biennium and legislation for the 2005 session.

For more information about the Legislative Council, call Lois Menzies at (406) 444-3066 or send an e-mail to [lomenzies@mt.gov](mailto:lomenzies@mt.gov).

## THE BACK PAGE

### WATER--HOW IMPORTANT IS IT ANYWAY?

By Krista Lee Evans, Research Analyst  
Legislative Environmental Policy Office

#### INTRODUCTION

The dust blows in around the edges of the windows and creates a fine gritty covering on anything that is not vertical. My mother-in-law chases the dust, swiping it up nearly as soon as it makes contact with any surface. Seems to me to be a losing battle. The hot dry wind makes a person think of harvest time in August when you can almost hear the grain ripening, the grasshoppers are hard at work, and vegetation is crunchy under your feet. You hear talk of water restrictions and Montana cities not filling the community swimming pool because the water is too low in the river. The lawn starts to brown, if it got green at all, as the heat takes its toll, and it is questionable whether the trees and shrubs will make it or not. Then you look at the calendar and remember that it is only June--the beginning of the growing season when there is supposed to be enough water to do all of those "necessary" things and keep the lawn green. The news is full of stories about the lack of snowpack and how we can, once again, expect a lower than average amount of precipitation. It makes me wonder how long it takes before the "average" gets drawn down to where we are now. Does it take 5, 10, 15, or maybe 50 years?

Water, historically, decided the fate of various endeavors in Montana. For example, towns are almost always near a decent source of water, livestock handling facilities were almost always built right on a water source to allow the animals easy access to the flowing lifeline, mines relied on water to process their ore, and transportation required water for the horses, steam engine, or ferry. Water decides where we live, how we live, and ultimately if we live. Water, water, water.

Depending on who you talk to and where they are from, Montana is in its sixth or seventh year of drought. Many are asking themselves, when will this end? Others are asking, will it **ever** end? The following excerpt from a New York Times article says it all.

"Some are beginning to realize that a world of eternally blue skies and meager mountain snowpacks may not be a passing phenomenon but rather the return of a harsh climatic norm. Continuing research into drought cycles over the last 800 years bears this out, strongly suggesting that the relatively wet weather across much of the West during the 20th century was a fluke. In other words, scientists who study tree rings and ocean temperatures say, the development

of the modern urbanized West--one of the biggest growth spurts in the nation's history--may have been based on a colossal miscalculation."<sup>1</sup>

#### STATUS IN THE WEST

Montana isn't the only state in the West facing an extended drought. In fact, lucky for us, we are in a headwaters state and at least see the water initially. Some states are screaming for water already, and the hot and dry summer months haven't even arrived. The city of Denver has already instituted water restrictions, and other cities are looking at doing the same. Lake Powell in Arizona has been an oasis in the desert west since it was built starting in the 1950s. Lake Powell, the second-largest artificial lake in the United States, has served as a demonstration of human ability to "manage" water. Deals have been made for portions of the water that Lake Powell holds, and it has always seemed to be an endless supply of water for the arid western states that rely on the lake for the lifeblood that it provides. However, this source of a seemingly endless supply of fresh water is starting to show its limitations. Lake Powell is currently at 40% of its capacity--a level that it hasn't been at since it was being filled during the Nixon administration in the early 1970s. If water levels continue to fall and the drought persists, it is estimated that Lake Powell will be unable to generate electricity as early as 2007, if not sooner. What then? Where will the thirsty cities, some with populations greater than our whole state, go for water and the electricity that allows them to exist?

#### WATER QUANTITY IN MONTANA

This is where the question of how much water do we "own" in Montana comes in to play. Can we sell, lease, or give water to other states? How do we know? Not only that, what if a downstream state comes to "take" our water? How do we prove that we are entitled to a certain amount without having an accurate and completed adjudication? The issue that Montana citizens are facing with Fort Peck epitomizes this dilemma.

The Montana Constitution boldly claims that "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."<sup>2</sup>

In order to better understand the complexity of this issue, it is important to understand where we came from and where we are going with regard to determining how much water in Montana has a water right of some sort attached to it.

Prior to 1972, in order to have a right to use water in Montana, all you had to do was put it to beneficial use. You could file a notice if you chose to with the county, but a water

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<sup>1</sup>"Drought Settles In, Lake Shrinks and West's Worries Grow", The New York Times, May 2, 2004.

<sup>2</sup>Article IX, section 3(3), Montana Constitution



user was not required to file. In 1972, the new constitution, in Article IX, section 3(1), provided that "[a]ll existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed."

In other words, anyone who was putting water to a beneficial use before 1972 has a constitutionally protected and guaranteed water right. The only question, because no paperwork was required, is how much water is associated with each right and how will the state keep track of it in the future? In order to address this question, the Water Use Act was passed and became effective in July 1973, and additional legislation has been passed in subsequent legislative sessions. This fulfills the constitutional requirement in Article IX, section 3(4), that "the Legislature shall provide for the administration, control, and regulation of water rights and shall establish a system of centralized records, in addition to the present system of local records."

At one point, adjudicating Montana's water was so important to policymakers holding the purse strings that the Department of Natural Resources and Conservation had 30 staff allocated to determining claims accuracy and the Legislature created a special Water Court. Both DNRC and the Water Court have continued the process of claims examination and adjudication of Montana's water. However, it has been nearly 30 years since the process began, and the end is still not in sight. DNRC's staff has been cut from 30 to about 10, and the Water Court struggles to get decisions on specific water rights cases done. Some issues have been before the Water Court for 5 years or more, and the parties are still waiting for a decision.

The question becomes: How important is it to the State of Montana and its citizens to quantify the amount of water that we use and are entitled to in the event that there is a challenge? To quote a headline from the Spring 2004 issue of *Montana, The Magazine of Western History*, "The Fellow Who Can Talk the Loudest and Has the Best Shotgun Gets the Water". Historically, that is how water has been appropriated in Montana in the event of a dispute. In some areas where the conflict over water was extremely heated or the water users on a particular stream wanted to be assured that their water rights were protected, the water users went through the District Court to get a decree that specified who got what water and when. However, these old District Court decrees did not take into account other water users or streams in a basin. Therefore, these decrees are likely to change when the new adjudication program looks at the water and its allocation from a basin standpoint rather than stream by stream.

## WATER RIGHTS AND ADJUDICATION

This issue is of so much importance that the Montana Supreme Court issued an order on June 8, 1979, requiring every person claiming ownership of an existing water right (a water right that existed prior to 1972) to file a claim with DNRC. Claims not timely filed were lost because the statutory conclusive presumption was that the water right was abandoned. Whether a water right was subject to an existing District Court Decree or not, the entity holding that water right was still required to file its claim.

When the state decided to take on statewide water adjudication, what it did, essentially, was start a huge lawsuit with every water user a party. Because it has been so long since the adjudication was filed and water users were required to file claims, it is probably safe to assume that some don't even know that they are party to the discussions, let alone how important their involvement is. The only way that a water right claim can be changed is: (1) by the claimant; (2) by another water user with ownership interest in the water filing an objection before the Water Court against the user's neighbor; or (3) through the exercise of the Water Court's on motion authority. If the Water Court determines that there are issues with a claim that require the Water Court's attention, it can call the claim in to the court on the court's motion.

Even though the adjudication process was set up and tends to operate in a user-friendly manner, the process is complex and sometimes frustrating to those who are involved. Some parties have retained an attorney to help them through the process, and others appear pro se. The policymakers and citizens of Montana need to decide how important water adjudication is to Montana. Until it is a top priority again, the program will continue to drag on and on with many of the original claimants passing away before having the opportunity to defend or address their water right claim in court. As we move down the generational line from those who originally filed the claim, the institutional knowledge of how and when that water was historically put to beneficial use gets less and less. The information that those people have to offer is critical. In fact, a water right is defined by the historic beneficial use of the water.<sup>3</sup> Who better to explain the historical use than those who have been doing it?

The water adjudication deals with all water rights and affects every citizen in Montana. Of course, irrigators and hydroelectric facilities have water rights and are obviously affected, but it is important to remember that cities, towns, industries, and others rely on water rights as well. A city that provides water to its citizens has to have a water right--the question is, how much certainty is associated with the amount of water in the right? Should the city look for additional water sources? What happens when a city continues to expand and its existing water right won't meet demand? Is there additional water available in its current water source? How do we know? If there isn't water available, can the city buy a water right from someone else? The ability to purchase water rights will be a critical tool in the future. However, without some level of certainty, how are a buyer and seller supposed to come to an agreement without a full and complete understanding of what they are buying and selling?

Montana's water adjudication program has faced many challenges throughout its years. As the level of interest of the people waxes and wanes from issue to issue and from year to year, the Legislature has placed varying degrees of importance on the subject. The process for addressing water right claims has evolved and changed, and the Chief Water Judge has changed. Montana policymakers and citizens are faced with a

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<sup>3</sup>*McDonald v. State*, 220 Mont. 519, 722 P.2d 598 (1986)

decision: How important is completing the water adjudication? The three alternatives that exist are:

- (1) continue doing the adjudication the way that we have been and look to completing it in another 40 years at a cost of at least \$50 million;
- (2) stop working on adjudication and hope that no one comes knocking on our door looking for water; or
- (3) find some way to fund the adjudication program so that it can be completed in a timely manner--15 years, for example--and allow the water users of the state an opportunity to have some certainty to their water rights.



## INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,  
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL BLDG.

### JUNE

June 3-4, State-Tribal Relations Committee visit to the Northern Cheyenne Indian Reservation

June 7, EQC Water Adjudication Working Group, Museum of the Rockies, Bozeman, Montana, 9:30 a.m.

June 8, Local Government Subcommittee, Room 137, 1 p.m.

June 9, Education and Local Government Committee, Room 137, 9:30 a.m.

June 9-10, Energy and Telecommunications Committee, Colstrip, Montana

June 14-15, State Administration and Veterans' Affairs Committee, Room 137

June 17, Legislative Finance Committee, Room 137, 1 p.m.

June 18, Legislative Finance Committee, Room 137, 8 a.m.

June 22, Legislative Audit Committee, Room 137

June 24, SJR 32 Subcommittee on Medical Liability Insurance, Room 317

June 25, Legislative Council, Room 317

June 29-30, Children, Families, Health, and Human Services Committee, Room 152

June 30, Economic Affairs Committee, Room 137

**JULY**

July 1, Economic Affairs Committee, Room 137

July 7, Joint Subcommittee on Postsecondary Education Policy and Budget with Board of Regents, Pablo, Montana

July 9, Revenue and Transportation Committee, Room 137, 8 a.m.

July 19, EQC Agency Oversight Subcommittee

July 19, EQC Energy Policy Subcommittee

July 19-20, Environmental Quality Council, Room 102

